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84-294

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENVIROTECH CORPORATION
AND
ENERGY FUELS NUCLEAR, INC.,

Petitioners,

v.

AMSTAR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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August 24, 1984

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QUESTIONS PRESENTED

1. Whether the newly-established Court of Appeals for the Federal Circuit is bound by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) in reviewing a District Court's findings of fact, arrived at after lengthy trial, or whether the Court of Appeals may instead substitute its own factual determinations on contested factual issues for those of the District Court.

2. Whether the Court of Appeals, after reversing the District Court for an improper application of the law, may make its own factual determinations *de novo*, contrary to findings of fact by the District Court that were not implicated by the error of law.

STATEMENT PURSUANT TO RULE 21(b)

The caption of the case in this Court contains the names of all parties in the proceedings below.

STATEMENTS PURSUANT TO RULE 28.1

1. Petitioner Envirotech Corporation (Envirotech) is a wholly-owned subsidiary of Baker International Corporation.

Envirotech's subsidiaries, other than wholly-owned, are as foliows:

Eimco Elecon (India) Ltd. (India)
Eimco S.A. (Chile)
Eimco Sudamerica, Inc. (Panama)
Mitsui Zosen Eimco, Inc. (Japan)
Sumitomo Jukikai Envirotech, Inc. (Japan)
Esmil-EVT (Netherlands)

Envirotech's affiliates are the other subsidiaries of Baker International Corporation, namely:

Baker Mining Equipment Company (California)
Baker Mine Services, Inc. (West Virginia)
Baker Technology S.A. (Panama)
BKO (Singapore) Pte. Ltd. (Singapore)
Chas. S. Lewis and Co., Inc. (Missouri)
The Galigher Company (Utah)
Galigher Ash Canada, Ltd. (Canada)
Galigher International, Inc. (Utah)
Galigher Ash (Australia) Pty. Limited (Australia)
Galigher Pacific Pty. Ltd. (Australia)
Galigher West (Utah)
Gault Tool Company, Inc. (Oklahoma)
Ingenieria Ramsey Mexicana, S.A. (Mexico)
Lewis Pump International, Inc. (Missouri)
GLI Corporation (Washington), and its subsidiary:
Grad-Line Export, Inc. (Washington)

Baker International Energy, Inc. (California), and its subsidiaries:

Baker International Finance N.V. (Netherlands Antilles)

D.W. Zimmerman Mfg. Inc. (Ohio), and its subsidiary:

ZIMDISC (California)

Reedrill, Inc. (Texas), and its subsidiary:

Reedrill DISC, Inc. (California)

Reed Mining Tools, Inc. (Texas), and its subsidiaries:

Reed Mining Tools DISC, Inc. (Delaware)

Reed Mining Tools South Africa Pty. Ltd. (South Africa)

Baker Drilling Equipment Company (California), and its subsidiaries:

Baker Tubular Services, Inc. (Delaware), and its subsidiaries:

Coating Services International, Inc. (Texas)

Plastic Applicators, Inc. (Texas)

Zap-Lok Systems International, Inc. (Texas)

Process Tool Company (Texas)

United States Consultants, Inc. (Nevada), and its subsidiaries:

United States Consultants Limited (Hong Kong)

United States Consultants Pty. Limited (Australia)

PA Incorporated (Delaware), and its subsidiaries:

The Ralph Lowe Company (Texas)

PA International Disc, Inc. (Texas)

PA-Teijin Co. Ltd. (Japan)

Reed Tubular Products Company (Texas), and its subsidiaries:

Reed Tubular Sales, Inc. (Delaware)

Reed Nippon Corporation (Japan)

Baker Tubular Services International, Inc. (Delaware), and its subsidiaries:

PA International, Inc. (Panama)

Pai Malaysia Sdn. Bhd. (Malaysia)

Exploration Logging, Inc. (California), and its subsidiaries:

Exploration Logging Arabian Gulf Ltd. (Jersey)

Exploration Logging, B.V. (Netherlands) and its subsidiary:

Exploration Logging Italia Srl. (Italy)

Exploration Logging Canada, Ltd. (Canada)

Exploration Logging do Brasil Equipamentos, Ltda. (Brazil)

Exploration Logging Espanola S.A. (Spain)

Exploration Logging International, Inc. (Panama)

Exploration Logging (Ireland) Ltd. (Ireland)

Exploration Logging (Malaysia) Sdn. Bhd. (Malaysia)

Exploration Logging Norge A/S (Norway)

Exploration Logging of Australia, Inc. (Nevada)

Exploration Logging of Japan, Inc. (Nevada)

Exploration Logging of U.S.A., Inc. (California)

Exploration Logging of U.S.A. Central, Inc. (Colorado)

Exploration Logging of U.S.A. East, Inc. (Nevada)

Exploration Logging Overseas, Inc. (Panama)

Exploration Logging S.A. (Nevada)

Exploration Logging (Singapore) PTE. Ltd. (Singapore)

R.F. Smith Corporation (California)

Exploration Logging Production Services S.A. (Switzerland)

Exploration Logging (N.S.) Company S.A. (Switzerland), and its subsidiary:

Exploration Logging North Sea Limited (United Kingdom)

Lynes, Inc. (Texas), and its subsidiaries:

Lynes DISC, Inc. (Texas)

Lynes do Brazil Limitada (Brazil)

Lynes International, Inc. (Nevada), and its subsidiaries:

Lynes Caribbean, Inc. (Nevada)

Lynes International G.m.b.H. (Germany)

Lynes International Sea PTE. Ltd. (Singapore)

Lynes International Services, Inc. (Panama)

Lynes Petrotech (Norge) A/S (Norway)

Lynes United Services Ltd. (Canada), and its subsidiary:
BKO Management Ltd. (Canada)
Milchem Incorporated (Delaware), and its subsidiaries:
Fluidos Perforacion Milchem Guatemala S.A. (Guatemala)
Milchem Canada Limited (Canada)
Milchem Cameroun s.a.r.l. (Cameroon)
Milchem de Venezuela, S.A. (Venezuela)
Milchem DISC, Inc. (Delaware)
Milchem Services Limited (Ireland)
Milchem Western Hemisphere, Incorporated (Delaware)
Mil-Reed Incorporated (Texas)
Milwhite Mud Sales Company (Delaware)
Productos Industriales Mineros S.A. (Prima) (Columbia)
Drilling Fluids Incorporated (Delaware), and its subsidiary:
Geofluids Pty. Limited (Australia)
Milchem International Limited (Bahamas), and its subsidiaries:
Milchem Libya Co. Ltd. (Libya)
Milchem International (Nigeria) Ltd. (Nigeria)
P. T. Milchem Indonesia (Indonesia)
Milchem Nederland B.V. (Netherlands), and its subsidiaries:
Milchem Minerals Limited (Ireland), and its subsidiary:
Societe Anonyme de Broyage Minerai du Cameroon (Cameroon)
Milchem France s.a.r.l. (France), and its subsidiary:
Milchem Gabon s.a.r.l. (Gabon)
Milchem Venezuela Corporation (Delaware), and its subsidiaries:
Milafon Venezolana C.A. (Venezuela)
TOTCO de Venezuela C.A. (Venezuela)

Reed Tool Company (Delaware), and its subsidiaries:
- G.W. Murphy Industries de Venezuela S.A. (Venezuela)
- Murphy Eastern Pty. Limited (Australia)
- Reed Rock Bit Company (Nederland) B.V. (Netherlands)
- Reed Rock Bit do Brasil Industria de Equipamentos de Perfuracao Ltda. (Brazil)
- Reed Roller Bit Company (Texas)
- Reed Tool Company of Australia Pty. Ltd. (Australia)
- Reed World Sales, Inc. (Delaware)
- Reed World Trade Corporation (Texas)
- Trepanos IMET S.A.I. Metalurgicals (Chile)
- Reed Tool Company (Texas), and its subsidiaries:
  - Reed Rock Bit Co. de Chile Limitada (Chile)
  - Reed Tool Company of Western Hemisphere (Texas)
- Reed Tool Company International Ltd. (Bermuda), and its subsidiary:
  - Reed Rock Bit Co. International Ltd. (Bermuda)
- Reed Tool Company of Canada Ltd. (Canada), and its subsidiaries:
  - Gruner Bit Company Ltd. (Canada)
  - Portable Electric Tools, Ltd. (Canada)
- Reed-American Products Company (Texas), and its subsidiaries:
  - Reed-American International Ltd. (Cayman Islands)
  - Reed-American Sales, Inc. (Delaware)
- American Coldset Corporation (Texas), and its subsidiaries:
  - ACC Diamond Products (Italia) SRL (Italy)
  - Reed ACC Diamond Products Ltd. (Canada)
  - ACC, S.A. de C.V. (Mexico)
  - American Coldset Corporation, Ltd. (Delaware)
  - American Coldset Holdings, Inc. (Delaware), and its subsidiary:
    - Reed ACC Australia Pty. Ltd. (Australia)
  - American Coldset International Corp. (Delaware)

ACC Diamond Products (Singapore) Private Limited (Singapore)

ACC Diamond Products de Venezuela C.A. (Venezuela)

Technical Oil Tool Corporation (Oklahoma), and its subsidiaries:

Visulogger, Inc. (Oklahoma)

TOTCO Asia Pacific, Inc. (Oklahoma)

TOTCO International Corporation (Oklahoma), and its subsidiaries:

TOTCO Canada Ltd. (Canada)

TOTCO International Ltd. (Bermuda)

TOTCO Operating Corporation (Oklahoma), and its subsidiary:

TOTCO DISC, Inc. (California)

Tri-State Oil Tool Industries, Inc. (California), and its subsidiaries:

Back-Off Specialists, Inc. (Delaware)

Intercontinental Energy Services, Inc. (Delaware)

Oil-Well Drilling Control, Inc. (Louisiana)

Rotary Oil Tool, Inc. (Delaware)

Technical Management (South Pacific) Inc. (Delaware)

Tri-State International, Inc. (Delaware)

Tri-State Oil Tool & Supply, Inc. (Delaware)

Tri-State Oil Tool (Egypt) S.A. (Panama)

Tri-State Oil Tool GmbH (Germany)

Tri-State Oil Tool (Latin America), Inc., (Delaware)

Tri-State Oil Tools (M) Sdn. Bhd. (Malaysia)

Tri-State Oil Tool (Malaysia), Inc. (California)

Tri-State Oil Tool (Middle East) Ltd. (Cayman Islands)

Tri-State Oil Tool (Norway), Inc. (Delaware)

Tri-State Oil Tools S.A. (Panama)

Tri-State Oil Tool (Saudi Arabia), Ltd. (Cayman Islands)

Tri-State Oil Tool (Singapore) Pte. Ltd. (Singapore)

Tri-State Oil Tool (Thailand) Ltd. (Cayman Islands)

Tri-State Oil Tool (U.A.E.) Ltd. (Cayman Islands)

Baker Holding (U.S.), Inc. (Nevada), and its subsidiaries:

Tri-State Oil Tool (I.O.M.) Ltd. (Isle of Man)

Baker International Ltd. (United Kingdom), and its subsidiaries:

Baker CAC, Ltd. (United Kingdom)

Baker Leasing Ltd. (United Kingdom)

Bakerline (U.K.) Ltd. (United Kingdom)

Baker Oil Tools (U.K.) Limited (United Kingdom)

Baker Production Services (U.K.) Ltd. (United Kingdom)

Baker Sand Control (U.K.) Ltd. (United Kingdom)

Milchem Drilling Fluids Ltd. (United Kingdom)

PA International (Tubular Inspection) Limited (United Kingdom)

Ramsey Process Controls Ltd. (United Kingdom)

Reed Mining Tools Limited (United Kingdom)

SEACO Sales & Services (North Sea) Limited (United Kingdom)

ACC Diamond Products U.K. Limited (Scotland)

ACS Secretarial and Invoicing Services Limited (England)

Tulloch Engineering Limited (United Kingdom)

Lombard Baker Leasing Company (United Kingdom)

TOTCO (U.K.) Ltd. (United Kingdom)

Tri-State Oil Tool (U.K.) Ltd. (United Kingdom)

Lynes Petrotech Ltd. (United Kingdom)

Exploration Logging (U.K.) Ltd. (Scotland), and its subsidiary:

Exploration Logging (Services) Ltd. (United Kingdom)

Magnachem Limited (United Kingdom), and its subsidiary:

Technical Chemical Mfg. Co. (United Kingdom)

Baker Oil Tools, Inc. (California), and its subsidiaries:
- Archer-Reed Wireline Services (California)
- Baker Far East Ltd. (Bermuda)
- Baker International Cote D'Ivoire s.a.r.l. (Ivory Coast)
- Bakerline Far East, Inc. (Delaware)
- Bakerline Services Ltd. (Cayman Islands)
- Baker Nigeria Ltd. (Nigeria)
- Baker Oil Tool (Australia) Pty. (Australia)
- Baker Oil Tools (Espana) S.A. (Spain)
- Baker Oil Tools (Far East) Pte. Ltd. (Singapore)
- Baker Oil Tools G.m.b.H. (Germany)
- Baker Oil Tools (H.K.) Ltd. (Hong Kong)
- Baker Oil Tools (Italia) SRL (Italy)
- Baker Oil Tools (Nederland) B.V. (Netherlands)
- Baker Oil Tools Norway, A/S (Norway)
- Baker Packers of Canada, Inc. (Canada)
- Baker Production Services (Australia) Pty. Ltd. (Australia)
- Baker Production Services, Inc. (Texas)
- Baker Production Services (Norway) A/S (Norway)
- Baker Production Services Pte. Ltd. (Singapore)
- Baker Sand Control Cameroun s.a.r.l. (Cameroon)
- Baker Sand Control Gabon s.a.r.l. (Gabon)
- Baker Sand Control Italia SRL (Italy)
- Baker Sand Control (Canada) Ltd. (Canada)
- Baker Sand Control Bruneison Bhd. (Brunei)
- Baker-Disc, Inc. (Texas)
- Baker Sand Control Italia (Manufacturing) SRL (Italy)
- Baker Sand Control Ltd. (Bermuda)
- Baker Sand Control Services Tecnicos, Ltda. (Brazil)
- Baker Transworld, Inc. y Compania Limitada (Chile)
- Baker Well Services International Ltd. (Bermuda)
- Baker Tools, Inc. (Louisiana)
- P.T. Baker Indonesia (Indonesia)
- Reed-American Prolift, Inc. (Texas)
- Services Petrolier Baker S.A. (France)

Societe d'Etudes Petroliers (France)
Trans Tool Sdn. Bhd. (Malaysia)
Kobe do Brazil Limitada (Brazil)
Kobe International, Inc. (California)
Kobe Pumps Ltd. (Canada)
Kobe WHTC (California)
Kobe Worldwide, Inc. (California)
Kobe International Sales & Service (California), and its subsidiary:
  Kobe Argentina S.A. (Argentina)
Baker CAC, Inc. (Louisiana), and its subsidiaries:
  Baker CAC International Ltd. (Cayman Islands)
  Pneu-Hydro Products Inc. (Delaware)
  CAC International, Inc. (Louisiana)
  CAC International Sales Corporation (Louisiana)
  CAC Investments, Inc. (Louisiana)
Baker Eastern S.A. (Panama), and its subsidiary:
  Baker Middie East Dev. Company s.a.r.l. (Lebanon)
Baker International S.A. (France), and its subsidiaries:
  Baker International Cameroon (Cameroon)
  Baker International Congo s.a.r.l. (Congo)
  Baker International Gabon s.a.r.l. (Gabon)
Baker Production Services Ltd. (Bermuda), and its subsidiary:
  Baker Mira Saudi Arabia Limited (Saudi Arabia)
Baker Transworld, Inc. (California), and its subsidiaries:
  Bakerline Canada, Ltd. (Canada)
  Baker do Brasil Equipamentos Ltda. (Brazil)
  Baker Production Services (Canada) Ltd. (Canada)
  Baker Service Tools Canada Ltd. (Canada)
  CNC Superior Machine Works Ltd. (Canada)
Magna Corporation (California), and its subsidiaries:
  Baker Oil Treating (SEA) Pte. Ltd. (Singapore)
  Magnachem B.V. (Netherlands)
  Magnachem G.m.b.H. (Germany)

Magnachem Limited (Canada)
Magna International Ltd. (Bermuda)
Magna Pty. (California)
Servicios Y Herramientas Petroleras S.A. de C.V. (Mexico) and its subsidiary:
Herramientas Interamericanas S.A. de C.V. (Mexico), and its subsidiary:
Bakerline de Mexico S.A. de C.V. (Mexico)
Ramsey Engineering Company (California), and its subsidiaries:
Texas Nuclear Corporation (Texas)
Ramsey Engineering B.V. (Holland)
Ramsey Engineering G.m.b.H. (Germany)
Ramsey Engineering Trading Co. (Minnesota)
Ramsey Ingenieros S.A. (Spain)
Ramsey Italia SRL (Italy)
Ramsey Engineering Africa Pty. Ltd. (South Africa), and its subsidiary:
Texas Nuclear (S.A.) (Pty) Ltd. (South Africa)
Ramsey REC Ltd. (Canada), and its subsidiary:
Ramsey Comercio Industria Ltda. (Brazil)
Ramsey Engineering (Pty) Ltd. Co. (Minnesota), and its subsidiary:
Ramsey Engineering Controls Pty. Ltd. (Australia)

2. Petitioner Energy Fuels Nuclear, Inc. is wholly owned by JRA Enterprises, Ltd., and has no subsidiaries.

The following are affiliates of Petitioner Energy Fuels Nuclear, Inc.:

Centurion Nuclear, Inc.
EFT Energy Fuels Trading AG
E.F. Uranium Group, Inc.
Energy Fuels Exploration Company
Energy Fuels Ltd.
Hanksville-Blanding Limited Partnership
Nuclear Developers, Ltd.
The Helicopter Company, Inc.

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No.

In The

Supreme Court of the United States

October Term, 1984

Envirotech Corporation
and
Energy Fuels Nuclear, Inc.,

Petitioners,

v.

Amstar Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners Envirotech Corporation and Energy Fuels Nuclear, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, as modified on limited rehearing, is reported at 730 F.2d 1476 (CA Fed. 1984) and is included in the Appendix to this petition at A-1. The order of the Court of Appeals denying rehearing sought by Petitioners, the order of the Court of Appeals granting rehearing by Respondent for the limited purpose of modifying the Court of Appeals' opinion, and the judgment of the Court of Appeals are set forth in the Appendix at A-108, A-109, and A-111, respectively. The opinion of the District Court, including

its appendices, is unreported and is reprinted in the Appendix at A-19.

GROUNDS OF JURISDICTION

The original judgment of the Court of Appeals for the Federal Circuit was entered on March 27, 1984. Respondent's motion for rehearing was granted and the Court of Appeals opinion was modified on April 16, 1984. (A-109-10) Petitioners' timely petition for rehearing was denied on June 12, 1984. (A-108) Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

FED. R. CIV. P. 52(a):

> "(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF THE CASE

Respondent Amstar Corporation ("Amstar") brought suit against Petitioners Envirotech Corporation ("Envirotech") and Energy Fuels Nuclear, Inc. ("Energy Fuels Nuclear") for

infringement of a patent (U.S. Patent No. 3,523,889) issued on August 11, 1970, to Frederick G. Eis, and assigned to Amstar. The Eis patent covers an apparatus and a method for rapidly separating suspended solid particles from liquids, which is useful in applications such as industrial processing and waste water treatment. Petitioner Envirotech manufactures and sells machines that compete with those based on the Eis patent, which are manufactured and sold by Amstar. Petitioner Energy Fuels Nuclear purchased several of these machines from Envirotech. Amstar accused several models of the Envirotech machines, including the machines used by Energy Fuels Nuclear, of infringing the Eis patent.

After a lengthy trial to the Court that generated some 300 exhibits and over 1150 pages of transcript, and included a videotape demonstration and on-site plant demonstrations of the Envirotech apparatus, the United States District Court for the District of Utah found the Eis patent valid,[1] and found that Envirotech's patented equipment[2] did not infringe the Eis patent. The Federal Circuit reversed the District Court's finding of no infringement, concluded that the Eis patent was infringed based on its own findings, and remanded solely for consideration of an

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[1] The finding of validity of the Eis patent is not in issue before this Court. The District Court's jurisdiction was based on 28 U.S.C. § 1338 (1982).

[2] Envirotech designed, manufactured, and/or used several models of equipment, including a pilot version, a version sold to Eagle Coal & Dock and Energy Fuels Nuclear, and "modified" versions used by Energy Fuels Nuclear and Eagle Coal & Dock after this suit was filed. See Plaintiff-Appellant's Appeal Brief ("Amstar's Brief") at 15 (A-114). The District Court based its conclusion of non-infringement solely on the "modified" versions; it believed Amstar suffered "no cognizable injury or wrong" as a result of the other, early versions. (A-66) In this petition, references to Envirotech equipment are therefore to the "modified" versions thereof. The Envirotech equipment is covered by U.S. Patent No. 4,055,499 issued to Robert C. Emmett, Jr. on Oct. 25, 1977.

injunction against further infringement and for an accounting of damages.

In reversing the District Court's finding on the fact issue of infringement, the Federal Circuit in effect adopted a new standard of review and departed from Rule 52(a)'s clear directive that fact findings should be rejected only if clearly erroneous.

1. *The District Court's Findings of Fact.*

The District Court found that Envirotech did not infringe the Eis patent because the Envirotech equipment included an additional element that is not used in the Amstar equipment.[3] In another, independent finding, the District Court found that the Envirotech equipment did not include an essential element required by the Eis patent, namely a baffle used to arrest and outwardly displace the incoming liquid.[4] Since it is well established that omission in the accused device of an element required

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[3] This additional element is mechanical mixing. (A-65)

[4] The only claims considered by the Court of Appeals and at issue here are process claims 1 and 8 and apparatus claim 9. Claim 9 requires a baffle element, described as a:

> "unitary substantially horizontal baffle means adjacent the point of entry [of the incoming solution] established by said conduit means for arresting and altering the direction of motion of said influent feed whereby the influent feed is directed in a horizontally outward direction with respect to said centralized point of entry. . . ."

730 F.2d at 1480 (A-6). Claim 1 requires the step of:

> "arresting the motion of the influent feed [i.e., the incoming solution] and displacing the same outwardly through said previously formed agglomerates to cause additional agglomeration of the solids and the formation without additional agitation of a dense settleable mass of the solids and agglomerates. . . ."

730 F.2d at 1479 (A-4-5). Claim 8 contains a similar required step:

> "arresting the motion of said influent feed and displacing the same outwardly through the concentrated slurry in said

by the complainant's patent avoids infringement,[5] this additional finding of the District Court, unless clearly erroneous, requires the conclusion that Envirotech's equipment does not infringe the Eis patent. It was this dispositive finding that the Federal Circuit improperly reconsidered *de novo*.

Long before issuance of the Eis patent, the industry had employed gravity to separate suspended solids from liquid. This separation method involved placing liquid containing solids in a vessel and allowing gravity to cause the solids to settle to the bottom of the container, leaving clear liquid at the top. (A-28-29) Chemicals known as "settling aids" were also used to speed up the separation process by causing solid particles to adhere to one another ("agglomerate"), forming larger clusters of particles that settle more quickly than the individual particles would. (A-34) Before the time of the Eis patent, conventional equipment employed a combination of these two techniques.

The Eis patent claims both a specific process (claims 1 and 8) and a specific apparatus (claim 9) designed to speed the separation of solid particles from a liquid solution. The Eis machine

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settling zone to effect additional agglomerations of the solid particles. . . ."

730 F.2d at 1480 (A-5). The baffle element of apparatus claim 9 performs the "arresting and displacing outwardly" step of method claims 1 and 8. In trying to show infringement, Amstar contended only that the Envirotech device contained a baffle or that Envirotech's rotating disc was the equivalent of a baffle and caused the step of "arresting and displacing outwardly." Amstar's Brief at 43 (A-114). Expert testimony for both sides was directed to whether a baffle or a rotating disc arrested or displaced the flow of incoming fluid. (*E.g.*, Tr. 248-61, 716-18, 722-41) *See also* Amstar's Brief at 44-45 (A-114-15). Consequently, the District Court's finding that there was no baffle, or its equivalent, required by claim 9, is also a finding that there was no "arresting and displacing outwardly" step, required by method claims 1 and 8.

[5] *Cimiotti Unhairing Co.* v. *American Fur Refining Co.*, 198 U.S. 399 (1905); *Dunbar* v. *Myers*, 94 U.S. 187 (1876); *Prouty* v. *Ruggles*, 41 U.S. 336 (16 Pet.) (1842); 7 WALKER ON PATENTS § 543 (A. Deller ed. Supp. 1983).

generally operates to build agglomerates by introducing the solution to be separated, after the settling aid has been added, into a blanket of agglomerates already formed on the bottom of the settling vessel. The incoming stream is arrested and displaced outwardly through the blanket by a baffle; contact with the previously formed blanket of agglomerates causes further agglomeration of solids, thereby accelerating the separation process. (A-72-75) Significantly, each of the Eis process claims at issue requires the step of arresting the incoming flow of liquid and displacing it outwardly. Similarly, the Eis apparatus claim requires the horizontal baffle used to arrest and alter the direction of the flow.[6]

The District Court found that the Envirotech device did not include a required element of the Eis patent, a baffle used to arrest and displace outwardly the flow of incoming liquid. (A-65 n.55) This dispositive finding of fact by the District Court was supported by the testimony of an expert witness who had taken actual measurements of the flow of fluid in the Envirotech device and by a live demonstration during trial of the fluid flow in the Envirotech device at Envirotech's research facility in Salt Lake City. (Tr. 702-13, 718, 723, 725-26, 728-49, 822, 849-50, 856-57, 864-75, 879-80, 899) After reviewing the evidence, the District Court concluded:

> "*Consequently the equipment in question in this lawsuit* [i.e., Petitioners' equipment] *does not use a flat baffle plate as described by the Eis claims.* Testimony of R. Emmett, Tr. at 864-875.
>
> Even where a feed well design might have some form of bottom, flange, or base plate on the impeller shaft, *the function of the base plate is arguably dissimilar to the Eis baffle.* See generally Testimony of R. Emmett, Tr. at 728–749. The effects of the mixing chambers, impellers and baffles cannot be ignored in making findings as to infringement. Cf. Tr. at 1101."

(A-65 n.55, emphasis supplied)

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[6] *See* n.4, *supra.*

2. *The Federal Circuit's De Novo Determinations.*

The Court of Appeals for the Federal Circuit reversed, holding as to the first aspect of the District Court's opinion that the addition of an element does not negate infringement and that the District Court had therefore applied an improper legal test of patent infringement. 730 F.2d at 1481-82 (A-9). As to the second basis for the District Court's finding of no infringement, the Court of Appeals simply found as a matter of fact that "[i]nfringement is clear on this record." 730 F.2d at 1483 (A-12). In stark contrast to the District Court's factual conclusion that there was no baffle or equivalent mechanism, and, therefore, no "arresting and displacing" step, and in spite of recognizing that much of the District Court's discussion of the technology was "flawless," 730 F.2d at 1478 (A-2), the Court of Appeals premised reversal on its own, contrary findings of fact. First, the Court of Appeals concluded the Eis patent was literally infringed[7] by the Envirotech equipment:

> "As shown by unchallenged evidence, the accused product performs each of the process steps set forth in claims 1 and 8 and contains each of the elements set forth in claim 9."

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[7] The Court of Appeals also found that:

> "The district court's Memorandum Decision overlooked the claim charts (Px 32) introduced and analyzed at trial and presented here as part of Amstar's brief on appeal. Those charts establish unequivocally that the accused apparatus employed at Envirotech's pilot plants, and as originally sold to Eagle Coal and Dock and to EFN, constituted literal infringements of claims 1, 8, and 9."

730 F.2d at 1483 (A-11). However, this finding relates only to the original versions of the Envirotech equipment, which the District Court had found did not harm Amstar, and not to the "modified" versions, which are the only machines that are the subject of this petition. *See* n.2, *supra*. It was the "modified" versions that the Federal Circuit improperly concluded had infringed Amstar's patent. 730 F.2d at 1483 (A-12).

730 F.2d at 1480 (A-6). The Court of Appeals also resolved a second fact issue, equivalence, directly contrary to the District Court:

> "Nor could substitution of a rotating disc [in the mechanical mixer feed well] for the baffle of claim 9 escape infringement, the two being equivalent and the substitution bearing no relation to claims 1 and 8."

730 F.2d at 1482 (A-10). In making these fact findings, the Court of Appeals did not purport to hold the contrary findings of fact of the District Court to be clearly erroneous.

REASONS FOR GRANTING THE WRIT

The Newly Established Federal Circuit's Policy of Deciding Disputed Issues of Technical Fact *De Novo* in Clear Violation of Rule 52(a) Threatens the Efficient Administration of Justice and Calls for an Exercise of this Court's Power of Supervision.

A finding of infringement, whether literal or based on equivalent elements, is a determination of fact. *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 609 (1950); *Coupe* v. *Royer*, 155 U.S. 565, 579-80 (1895); *Winans* v. *Denmead*, 56 U.S. (15 How.) 330 (1853).[8] In rejecting the District Court's fact findings on the absence of literal infringement and infringement based on equivalent elements, the Federal Circuit radically departed from the "clearly erroneous" standard of FED. R. CIV. P. 52(a) and substituted its own factual determinations for those of the District Court.

Rule 52(a) requires that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

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[8] *See also SSIH Equipment, S.A.* v. *United States Int'l Trade Comm'n*, 718 F.2d 365, 376 (CA Fed. 1983), and the opinion of the Federal Circuit in this case 730 F.2d at 1481 (A-8).

witnesses." As this Court explained in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969):

> "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence."

See also United States v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2587 (1971). The rule is based on the fundamental premise that appellate courts are ill-suited to the *de novo* determination of facts, as well as on the recognition that the rule promotes the finality of judgments and efficiency in the administration of justice. *Pendergrass* v. *New York Life Insurance Co.*, 181 F.2d 136, 138 (CA8 1950); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2587 (1971).

The Federal Circuit was especially ill-suited to appraise and weigh the evidence here. The District Court determined how incoming fluids flowed inside the Envirotech device in order to determine if a baffle or rotating disc caused the flow to be arrested and displaced outwardly. Its decision involved weighing conflicting expert testimony and evaluating an on-site laboratory demonstration that was designed to illuminate this disputed point — and that was inherently incapable of full reconstruction in an appellate record.[9]

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[9] Court reporter entries in the trial transcript made during the laboratory demonstration, such as, "Those present view the above described process", are not helpful to an appellate court in determining what was demonstrated and observed by the District Judge. (Tr. 710) Additionally, substantial expert testimony was accompanied by drawings made during trial by the witnesses. (Tr. 269-71, 275, 277-82, 286, 728-40, 747-48, 895-97) Although the

The appellate courts must apply the same standard of review to technical and scientific factual findings as to other factual determinations. In *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950), this Court held that the need to defer to the trial court's factual findings is heightened by the exigencies of cases involving technical evidence:

> "To no type of case is [Rule 52(a)'s policy of deference to the trial court's decisions on factual issues] more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations."

336 U.S. at 274. *See also Bose Corporation* v. *Consumer's Union of United States, Inc.*, 104 S.Ct. 1949, 1958 (1984) ("We have repeatedly held that the rule [52(a)] means what it says.");

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completed illustrations were before the Court of Appeals, they do not, even when taken in combination with the transcript, permit the Court of Appeals to put itself in the same position as the District Judge. Neither the transcript, nor the completed illustrations themselves, indicate the sequence in which the illustrations were made in response to questions or the correlation between a given component of an illustration and corresponding testimony. For example, the following portions of the transcript, even when taken with the accompanying illustration, provide an incomplete record of what was observed by the District Judge:

> "Q. Yes. Go ahead and draw a line, if you wish, to indicate where the bottom of the feed well might be.
>
> A. (Drawing.)"

(Tr. 275)

> "Q. . . . . Show us with arrows, lines, whatever you may choose, what will be the condition of the fluid in that compartment?
>
> A. Am I to assume that the fluid was at rest before starting the impeller?
>
> Q. That's fine. Let's start with that.
>
> A. (Drawing.)"

(Tr. 271)

Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982);[10] *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).

The Courts of Appeals other than the Federal Circuit have followed this Court's directive in *Graver*. *See, e.g., Codex Corp.* v. *Milgo Electronic Corp.*, 717 F.2d 622, 627 (CA1 1983), *cert. denied*, 104 S. Ct. 1719 (1984) ("A determination of validity, however, requires certain factual inquiries, such as anticipation of prior art . . . . The findings of fact by the court below can be set aside only if they are clearly erroneous . . . . This is a recognition of the trial court's superior position with respect to factual determinations."); *Interdynamics, Inc.* v. *Wolf*, 698 F.2d 157, 176 (CA3 1982) ("In reviewing a finding of equivalence or infringement, this Court must accept the district court's determination unless it is clearly erroneous."); *Mayview Corp.* v. *Rodstein*, 620 F.2d 1347, 1353 (CA9 1980) ("It is for the trial court to resolve conflicts in the evidence, and we may overturn the district court's resolution only if it is clearly erroneous."); *Studiengesellschaft Kohle* v. *Eastman Kodak Co.*, 616 F.2d 1315, 1322-23 (CA5), *cert. denied*, 449 U.S. 1014 (1980) (The court refused to consider the evidence *de novo* despite allegations

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[10] *Inwood* is analogous to this case. In a Lanham Act context, this Court reversed the Second Circuit for precisely the reason urged by Petitioners here: The Appellate Court, ignoring the District Court's factual determination, decided *de novo* a disputed factual issue without deference to the mandate of Rule 52(a). Emphasizing that Rule 52(a) "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence," this Court held:

> "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' "

456 U.S. at 857-58, quoting *United States* v. *Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950).

that the trial court judge had absolutely no understanding of the factual matters before him.); *Black, Sivalls & Bryson, Inc.* v. *Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 950 (CA10 1978) (In a patent infringement action where the evidence is largely the testimony of experts, due regard is given to the opportunity of the trial court to judge the credibility of the witnesses.); *Rockwell* v. *Midland-Ross Corp.*, 438 F.2d 645, 649 (CA7 1971) ("Where the findings of the district court comparing the disclosures of the prior art to the patent claims and the accused structure are, in large part, based on expert testimony, [an appellate court] cannot consider the issues as though [it] were a *nisi prius* court.").

The legislative history relating to the formation of the Court of Appeals for the Federal Circuit affirms that the newly created appellate court must fully comply with the "clearly erroneous" standard of Rule 52(a). *See* 28 U.S.C. § 1292, § 1295 (1982). The House Committee Report, addressing the "fundamental difference" in the roles of technical advisors to trial and appellate courts, emphasized that:

> "[i]t is well established that factual issues in a patent case must be tried and decided by the trial judge or a jury in precisely the same manner as such issues are tried in any other kind of a lawsuit. The technical aspects of a patent case are factual issues, and patent cases are reviewed in the Circuit Courts in the same manner as with other appeals."

H. REP. NO. 312, 97th Cong., 1st Sess. 37 (1981). Indeed, the House Committee Report enunciated the Congressional intent that the newly created appellate court conform to the "clearly erroneous" standard, noting that "[t]he new court will function like . . . other appellate courts," H. REP. NO. 312, 97th Cong., 1st Sess. 18 (1981), and that:

> "Thus, it is the settled practice of the circuit courts of appeals in patent cases to honor and respect Rule 52(a) F.R.Civ.P., which provides that findings of fact may not be set aside unless clearly erroneous, giving

> due regard to the opportunity of the trial court to judge the credibility of witnesses. The circuit courts have repeatedly held that it is not their function to pass upon or consider de novo the evidence received at the trial or to weigh controverted evidence."[11]

H. REP. NO. 312, 97th Cong., 1st Sess. 37 (1981). That the Federal Circuit is a court of specialized jurisdiction is, then, no basis for departing from the requirements of Rule 52.

The Federal Circuit's substitution of its own factual findings for those of the District Court in this case is far from an isolated or aberrational occurrence. Since the Federal Circuit was created in 1982, complaints have been recorded frequently that the Federal Circuit has disregarded Rule 52(a).[12] Dissenting opinions in the Federal Circuit have pointed out that the new Court of Appeals "fails to recognize that this court and [trial courts] are not a single court with both original and appellate jurisdiction," and is "improperly stepp[ing] into the province of the fact finder." *Baginsky* v. *United States*, 697 F.2d 1070, 1077 (CA Fed.) (Kashiwa, J., dissenting), *cert. denied*, 104 S. Ct. 423 (1983). *See also Jones* v. *Hardy*, 727 F.2d 1524, 1534-35 (CA Fed. 1984) (Kashiwa, J., dissenting). The Federal Circuit's failure to comply with the mandatory standard for appellate

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[11] The House Committee Report reflects comments on § 119 of H. R. 4482, whose language is virtually identical to that of the statute as passed, 28 U.S.C. § 715 (c) and (d)(1982).

[12] *See RCA Corp.* v. *Applied Digital Data Sys., Inc.*, 730 F.2d 1440 (CA Fed. 1984), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-8); *TP Labs., Inc.* v. *Professional Positioners, Inc.*, 724 F.2d 965 (CA Fed. 1984), *petition for cert. filed*, U.S.L.W. 3892 (U.S. Apr. 21, 1984) (No. 83-1939); *W.L. Gore & Assocs.* v. *Garlock, Inc.*, 721 F.2d 1540 (CA Fed. 1983), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 2, 1984) (No. 84-2); *Rohm & Haas Co.* v. *Crystal Chem. Co.*, 722 F.2d 1556 (CA Fed. 1983), *petition for cert. filed*, 53 U.S.L.W. 3021 (U.S. July 5, 1984) (No. 84-1); *Raytheon Co.* v. *Roper Corp.*, 724 F.2d 951 (CA Fed. 1983), *petition for cert. filed*, 53 U.S.L.W. 3009 (U.S. May 30, 1984) (No. 83-2128). *See also White* v. *Jeffrey Mining Mach. Co.*, 723 F.2d 1553 (CA Fed. 1983), *petition for cert. filed*, 52 U.S.L.W. 3892 (U.S. May 22, 1984) (No. 83-1913).

review of factual determinations strongly commends the invocation of this Court's supervisory authority here.

There is no question but that there was conflicting evidence on the factual issue of the presence or absence of a baffle or equivalent element to cause the "arresting and displacing" step, and that the Federal Circuit was made aware of it. Indeed, Respondent Amstar's own brief before that Court outlined the conflict between Envirotech's expert Emmett and Amstar's witnesses on this issue, and Petitioners' motion for rehearing specifically protested the Court's failure to follow Rule 52. Amstar's Brief at 43-45 (A-114-15); Combined Petition for Rehearing and Suggestion for Rehearing in Banc at 3-11 (A-116-23).[13]

The Court of Appeals did not hold a single factual determination by the District Court "clearly erroneous," but attempted instead to justify its *de novo* determination of the fact of infringement on error of law by the District Court. However, the District Court's consideration of the additional step of "mixing" in the Envirotech device, found to be legal error, does not implicate its independent factual conclusion on the absence of other elements required by the patent claims.[14] Indeed, even if the two

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[13] The Court of Appeals opinion asserts that Envirotech did not discuss on appeal the absence of a baffle and of the arresting and displacing step as its grounds for finding no infringement. 730 F.2d at 1483-84 (A-12-13). However, not only did Amstar's brief clearly delineate the issue as one requiring a "clearly erroueous" standard of review, Envirotech raised it at oral argument, as the Court of Appeals begrudgingly recognized. 730 F.2d at 1484 (A-13 n.8).

[14] The Federal Circuit's assumption of a factfinding role on the infringement issue cannot be justified by its holding that the District Court incorrectly applied the law. Criticizing the District Court's consideration of the issue of infringement by comparing the differences between the Amstar and Envirotech commercial products, the Federal Circuit stated that governing law required comparison only of "the *accused* products and processes with the *claimed* products and processes." 730 F.2d at 1483 (A-12 n.6) (original emphasis). Conspicuously, the Federal Circuit never held that the assigned legal error affected the vitality of the trial court's

were believed to be related, a remand to the District Court, not a weighing of conflicting evidence by the Court of Appeals, would be required. "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). Given the abundance of expert testimony, documentary evidence, and live demonstrations before the District Court, the Federal Circuit's usurpation of the District Court's fact finding function here was clearly improper.[15]

The Federal Circuit exercises pendent jurisdiction over all causes of action joined with the patent, tax, and other issues within its exclusive, specialized jurisdiction. Pendent jurisdiction is thus exercised to resolve, for example, antitrust, unfair competition, breach of contract, and business tort issues. Consequently, the Federal Circuit's error in the application of Rule 52(a) threatens the efficient administration of justice in a wide range of legal issues, and disrupts the uniformity of the standard of appellate review on factual issues now employed by the other Circuit Courts. Because of the significance of the standard of appellate review of fact findings of the new Federal Circuit for the judicial system as a whole and because the Federal Circuit has so far departed from the accepted and usual course of

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factual determination that Envirotech's machines did not contain a baffle and that Envirotech's rotating disc was not equivalent to Amstar's pipe and baffle method of liquid dispersal. (A-65 n.55)

[15] Remand is also required where a district court has failed to make a necessary fact finding because of an erroneous view of the law. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982).

> "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. *DeMarco v. United States*, 415 U.S. 449, 450, n. (1974)."

Id.

judicial proceedings as to justify an exercise of this Court's power of supervision, the petition for a writ of certiorari should be granted.

The Federal Circuit's Policy of Deciding Issues of Fact *De Novo* in Violation of Rule 52(a) Creates a Conflict Among the Circuits.

The Federal Circuit stands alone in its disregard of Rule 52(a), which is followed by the other Courts of Appeals in technical and other cases. *See, e.g., Owens* v. *Wainwright*, 698 F.2d 1111, 1113 (CA11), *cert. denied*, 104 S. Ct. 117 (1983); *Minnesota Mining & Manufacturing Co.* v. *Blume*, 684 F.2d 1166, 1170 (CA6 1982), *cert. denied*, 103 S. Ct. 1449 (1983); *Friend* v. *Leidinger*, 588 F.2d 61, 64 (CA4 1978); *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (CA8 1977), *cert. denied*, 434 U.S. 1086 (1978); *United States ex rel. Fitzgerald* v. *E.J. La Valle*, 461 F.2d 601, 604 (CA2), *cert. denied*, 409 U.S. 885, (1972). *See also* cases cited at pp. 11-12, *supra*. While the Federal Circuit's jurisdiction is exclusive in patent cases, it has pendent jurisdiction over other issues. *See* p. 15, *supra*. Jurisdiction over these other issues is shared with the other Courts of Appeals. The petition for a writ of certiorari should be granted in order to ensure that the requirements of Rule 52(a) are uniformly followed in all circuits.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted. This Court should issue instructions governing the standard of review of fact findings in the Federal Circuit, or in the alternative, the judgment of the Court of Appeals should be summarily vacated and the case remanded with instructions to permit the District Court to reexamine its factual conclusions in light of the law of the case. Should this Court grant any of the other pending petitions for certiorari cited in this petition, which are also directed to the standard of review of fact findings by the Federal Circuit, then Petitioners request that the present case be consolidated with the other cases or held pending this Court's decision on the other cases.

Respectfully submitted,

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